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IN THE
COURT OF APPEALS OF INDIANA

RICHARD "BUZZ" ANDERSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A04-0602-CV-114
	)	
RONALD HERROD and	)	
DEBORAH HERROD,	)	
	)	
Appellees-Plaintiffs,	)	
	)	
	)	
CONSTANCE BOARDS,	)	
	)	
Appellee-Third Party Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable George Pancol, Master Commissioner
Cause No. 48D03-0407-PL-00713

MAY 4, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant/Appellant Richard Buzz Anderson appeals the trial court's judgment in favor of Plaintiffs/Third Party Defendants/Appellees Ronald Herrod and Deborah Herrod (collectively, "the Herrods") and Third Party Plaintiff/Appellee Constance Boards. We affirm in part and reverse and remand in part.

ISSUES

Anderson raises five issues for our review, which we renumber, consolidate, and restate as:

I. Whether the trial court erred in rescinding the real estate purchase contract between Anderson and the Herrods.

II. Whether the trial court's damage award in favor of the Herrods was proper.

III. Whether the trial court had jurisdiction to rule on Boards' request for damages from Anderson.

IV. Whether the trial court abused its discretion in ordering Anderson to pay attorney fees.

FACTS AND PROCEDURAL HISTORY

On May 21, 2003, Anderson, who owned a house and adjacent rental home, agreed to sell the two properties (collectively, "the property) on contract to the Herrods. Pursuant to the written contract between the parties, the Herrods made a down payment of $1000 and agreed to pay $600 per month on the property for a period of sixty months. The contract provided that "payment will be [due] on the first [day of the month] and late

on the fifth [day of the month]. A 10% late fee will be charged on the sixth [day of the month]. Ten days late, [the Herrods] are in default and will be evicted and lose all monies they have paid." (App. 16). The contract also provided that the sewer bill "must be paid each month and a copy [of the receipt] sent to seller." *Id*. The contract further provided that "any and all receipts must be shown and signed by Seller for any and all labor and materials used in repairs or improvements." *Id.*

After making some needed repairs to the property, the Herrods moved into the house. The Herrods made payments on the property until approximately June 28, 2004, but the payments were usually late. On several occasions, Anderson received notice that the sewer bill was not timely paid; however, sewer service was never discontinued.

On June 29, 2004, Anderson, who believed that the Herrods' were now tenants because of their late payments, sold the property to Constance Boards. Prior to signing the contract, Boards expressed an interest in meeting the "tenants," but Anderson persuaded her to wait until the contract was signed. On the day of the closing, Boards had arranged to meet Anderson at the house to introduce herself to the Herrods as their new landlord. Boards arrived early and began talking to the Herrods, who informed her that they were actually purchasers of the property. Boards saw Anderson pull up in his truck, then abruptly pull away "real fast." (R. 7). Anderson later claimed that he had received an emergency phone call which required his immediate presence somewhere else.

The Herrods filed suit against Anderson in Madison Superior Court, Division III. Among other things, the Herrods requested that Anderson pay them $5,987.88 for the

"loss of equity" in the property. The cause number for the case was 48D03-0408-PL-713.

Boards filed an eviction suit against the Herrods in small claims court, and the case was subsequently transferred to Madison Superior Court, Division III under the same cause number as Herrod's suit against Anderson. In the new action, Boards was designated as a "third party plaintiff" and the Herrods were designated as "third party defendants." However, at the hearing Boards presented Exhibt EE, which outlined the damages she wished to recover from Anderson.

After a hearing, the trial court rescinded the contract between Anderson and the Herrods and ordered Anderson to pay damages to the Herrods, in the amount of $5,987.88, for "loss of the Plaintiffs' equity."[1] Appellant's App. at 41. The trial court also ordered Anderson to pay the Herrods' attorney fees in the amount of $2,249.50.

In addition, the trial court rescinded the contract between Anderson and Boards and ordered Anderson to pay damages to Boards, in the amount of $27,699.95, "which would restore her to the position she was in before [Anderson] deeded said property to her." The trial court further ordered Anderson to pay Boards' attorney fees in the amount of $1,500.00.

Anderson now appeals.[2]

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[1] The trial court did not expressly rescind the contract, but there is no dispute that the contract between Anderson and the Herrods was rescinded.

[2] We note that the trial court later clarified its order by explaining that the property would belong to Anderson upon his payment of damages. We further note that the electronic recording of the hearing was defective and that the parties' attorneys each reconstructed the testimony through a verified statement of evidence. We commend the attorneys for their worthy efforts.

DISCUSSION AND DECISION

I. RESCISSION OF CONTRACT BETWEEN ANDERSON AND THE HERRODS

Anderson contends that the trial court erred in rescinding the contract for sale of the property to the Herrods and in awarding damages to them. Anderson argues that the Herrods breached the contract by consistently tendering late monthly payments and by occasionally making late sewer payments. Anderson cites *Wilson v. Lincoln Federal Savings Bank*, 790 N.E.2d 1042 (Ind. Ct. App. 2003), for the proposition that a party who has materially breached a contract may not seek to later enforce the contract.

A party may waive another party's strict performance of the terms of a contract by acts showing relinquishment of that term. *Unishops, Inc. v. May's Family Centers, Inc.*, 399 N.E.2d 760, 766 (Ind. Ct. App. 1980). Accepting one defective performance under a contract does not constitute a continuing acceptance of defective performance; however, where there has been a pattern of late payments, where the payee has not attempted to exercise any remedial provision of the contract, and where the payee has not been injured by the late payments, the payee has waived its objections to the lateness. *Id*.

In the present case, the Herrods made numerous late payments. Anderson testified that "probably" after the first or second late payment, he told the Herrods that, pursuant to the terms of the contract, they were now renters, not purchasers. The Herrods, who usually tendered payments in person, denied that Anderson gave them such notice. The Herrods also point out that Anderson never offered to return their down payment. Although Anderson claims that after the first or second late monthly payment, he treated the down payment as a rent deposit, the evidence presented indicates that he told Boards

that the Herrods had not paid a deposit. Furthermore, Anderson accepted $692.00 from the Herrods for payment of real estate taxes.

It appears that the trial court believed that Anderson failed to give notice to the Herrods and that his acceptance of a series of late payments operated as a waiver of his right to assert those late payments as a breach of the sales contract. We do not determine the credibility of witnesses; therefore, we accept the trial court's determination of the evidence. *See Foman v. Moss*, 681 N.E.2d 1113, 1116 (Ind. Ct. App. 1997). Because Anderson does not appear to have been injured by the tender of late monthly payments, and because he acquiesced to the lateness, we hold that he waived his right to now argue that the payments were a material breach of the contract. Accordingly, *Wilson* has no application to this case.[3]

Furthermore, we note that with few exceptions forfeiture provisions like the one relied upon by Anderson have long been deemed unenforceable. *See Skendzel v. Marshall*, 216 Ind. 226, 301 N.E.2d 641, 649-50 (1973), *cert.denied*, 416 U.S. 921, 94 S.Ct. 1421, 39 L.Ed.2d 476 (1974). Therefore, even if waiver did not apply, Anderson, who has not posited that any exceptions pertained under the facts of the instant case, would not prevail in his attempt to enforce the forfeiture provision.

II. PROPRIETY OF "EQUITY" AWARD

[3] We note that the contract does not state that late payment of sewer bills will result in default. We further note that Anderson argues that because the Herrods breached the contract, there was no contract at the time he sold the property to Boards. Thus, he concludes that the trial court erred in rescinding his contract with Boards. Our determination of this issue renders his argument moot.

Anderson contends that the trial court erred in awarding "equity" to the Herrods as damages designed to return the Herrods to their pre-contract status. Anderson argues that the "equity" should have been offset by the fair market rental value of the property and by payments that the Herrods received from the tenant of the rental home on the property.

Although the trial court purported to award damages for breach of contract, it is clear from a reading of the original order and the clarifying order that the trial court rescinded the contract between Anderson and the Herrods. When a contract is rescinded, no action can be maintained for breach of contract, and the parties may not seek general damages. *Hart v. Steel Products, Inc.*, 666 N.E.2d 1270, 1275 (Ind. Ct. App. 1996), *trans. denied*. Rescission is an equitable remedy that is intended to restore the parties to the status quo, i.e., to their pre-contract positions. *Yates-Cobb v. Hays*, 681 N.E.2d 729, 733 (Ind. Ct. App. 1997). A return to the status quo usually necessitates the return of money or other things received or paid under the contract, plus reimbursement for any reasonable expenditures incurred as the proximate result of the other party's breach. *Hart, id.* A party seeking rescission must return all consideration or benefits received under the contract. *Smeekens v. Bertrand*, 262 Ind. 50, 311 N.E.2d 431, 436 (1974).

In the present case, equity requires that the payments made by the Herrods be set off by the reasonable rental value of the house occupied by the Herrods and by the payments received from the tenant. Any improvements made by the Herrods should also be considered in the award. We remand with instructions that the trial court make an award that returns the Herrods to the status quo.

III. TRIAL COURT'S JURISDICTION

Anderson contends that the trial court lacked jurisdiction over the case to rule against him and in favor of Boards. In support of his contention, Anderson notes that while Boards' case against the Herrods was transferred to Cause No. 48D03-0408-PL-713, she neither filed an action against him nor was properly joined as a party to the Herrods' suit.

Jurisdiction over a particular case refers to the authority of a court to hear and determine a specific case within the class of cases over which the court has subject matter jurisdiction. *Harp v. Indiana Department of Highways*, 585 N.E.2d 652, 659 (Ind. Ct. App. 1992). Because jurisdiction over a particular case does not directly impact the trial court's subject matter jurisdiction, a court's order is voidable, not void. *Id*. Accordingly, jurisdiction over the particular case may be established by a party's failure to timely assert its absence. *Id.* In order to avoid waiver, a party must challenge the trial court's jurisdiction over the particular case at the first opportunity. *Id*.

Anderson argues that he did not object to Boards' involvement in the lawsuit because he considered Boards' involvement to be necessary to the issue between Boards and the Herrods. Anderson further argues that he learned of the possibility of his own liability to Boards' only upon receipt of the trial court's order. Anderson acknowledges that at the hearing Boards' entered Exhibit EE, a summary of damages that Boards wished to be paid, and that he did not object to the exhibit. He contends, however, that the exhibit "did not specify whether relief was sought against [the Herrods] or [Anderson]." Appellant's Brief at 22.

Our review of the Exhibit discloses that the entire summary of damages is geared to returning Boards to the status quo upon rescission of the contract she entered into with Anderson. It begins by listing the contract price and then subtracts out the construction allowance from Anderson to Boards. It then addresses other losses attributable to Anderson's actions under the contract. Anderson knew or should have known that Boards was asking for damages at the time the Exhibit was introduced. He could have, but did not object and/or ask for a continuance. Because he did not object at the first opportunity, Anderson waived this issue.

IV. PROPRIETY OF ATTORNEY FEE AWARD

Anderson contends that the trial court erred in ordering him to pay the Herrods' and Boards' attorney fees. He points out that there was no provision in either contract to allow such an award.

Indiana follows the American Rule, which requires each party to pay his or her own attorney fees absent contract, agreement, or statute authorizing the award. *Masonic Temple Association of Crawfordsville v. Indiana Farmers Mutual Insurance Co.*, 837 N.E.2d 1032, 1037-38 (Ind. Ct. App. 2005), *trans. denied*. The Herrods point to Ind. Code § 34-52-1-1, which provides that the prevailing party in a civil action may recover attorney fees if the trial court finds that (1) the party brought a defense that is frivolous, unreasonable, or groundless; (2) the party continued to litigate a defense after it clearly became frivolous, unreasonable, or groundless; or (3) the party litigated the action in bad faith. Generally, when reviewing an award of attorney fees under Ind. Code § 34-52-1-1, we first review the trial court's findings of fact under a clearly erroneous standard and

review the legal conclusions of the trial court de novo. *American Directories, Inc. v. Stellhorn One Hour Photo, Inc.*, 833 N.E.2d 1059, 1071 (Ind. Ct. App. 2005), *trans. denied*. We review the trial court's decision to award attorney fees and the amount thereof under an abuse of discretion standard. *Id*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Id*. Here, because the trial court ordered the payment of attorney fees without setting out findings of fact and conclusions, we restrict our review to determining whether the trial court abused its discretion. *See id.*

As we discuss above, Anderson's defense centers around a forfeiture provision that generally has been held unenforceable. *See Skendzel, id.* We conclude that the trial court awarded attorney fees to the Herrods on the basis that Anderson's defense was frivolous because he failed to even attempt to show that an exception rendered his forfeiture provision enforceable. We cannot say that the trial court abused its discretion in doing so.

With reference to the award of attorney fees to Boards, we note that the trial court did not explicitly find, nor could it have found based upon the evidence presented and the confusion occasioned by the transfer of Boards' action to the superior court, that Anderson raised a frivolous, unreasonable, or groundless defense or that he litigated the action in bad faith. Indeed, it appears that the confusion engendered by the transfer resulted in the raising of no defense at all. The trial court abused its discretion in awarding attorney fees to Boards.

CONCLUSION

We affirm the trial court's order as it pertains to rescission of the contract between Anderson and the Herrods and to the award of attorney fees to the Herrods. However, we reverse and remand with instructions that the trial court vacate its damage award to the Herrods and enter an order that complies with the requirements set forth in Issue I above. We further reverse and remand with instructions that the trial court vacate its award of attorney fees to Boards.

Affirmed in part; reversed and remanded in part.

MATHIAS, J., and CRONE, J., concur.